No. 84-2001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLISON C. COLLARD and JULIA A. COLLARD,

Petitioners,

—against—

THE INCORPORATED VILLAGE OF FLOWER HILL; THE BOARD OF TRUSTEES; WILLIAM R. HOWE, BUILDING INSPECTOR; HERBERT ASH, THOMAS J. WALSH, ROBERT S. CAINE, ALFRED E. RUNGE, AND THE ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF FLOWER HILL; AND JOHN M. FARRELL, JR., ESQ., VILLAGE ATTORNEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

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Counter Statement of Questions Presented for Review

1. Were the District Court and the Court of Appeals correct in dismissing the petitioners' second cause of action on the grounds of *res judicata* and collateral estoppel, where (a) the respondents moved for dismissal at the inception of the action, on the ground, *inter alia,* that this was a situation where the District Court should abstain from exercising jurisdiction because the pendency of the state-court Article 78 proceeding provided a forum for the petitioners' constitutional claims; (b) the petitioners were afforded the opportunity to fully litigate their constitutional claims in a state-court Article 78 proceeding grounded on the identical operative set of facts and challenging the same acts of the respondents which are challenged here; and (c) the petitioners did not preserve their purported constitutional claims for federal court adjudication?

2. Were the District Court and the Court of Appeals correct in determining that the petitioners' allegations of "bad faith" by the respondents in denying the petitioners' application for a zoning variance in order to *increase* the perceived economic benefit from petitioners' property failed to state an injury of constitutional magnitude?

3. Although neither the District Court nor the Court of Appeals determined it necessary to reach the issue, is dismissal nonetheless warranted (a) by the absolute legislative and/or judicial immunity of certain respondents, and (b) the qualified "good faith" immunity of the remaining respondents, together with the petitioners' failure to plead facts which would satisfy the "objective bad faith" test for sufficiency of the pleadings?

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

Statement of the Case.

This Court is the *ninth court,* over an almost six-year period, to be charged with ruling on the petitioners' claims against these respondents. This is also, concommitantly, the *ninth time* that the respondents have been called upon to bear the expense and effort of mounting a legal defense in court.

The claims advanced by petitioners in each court arise from only one factual circumstance: the petitioners' inability to obtain a zoning variance for additional office building construction on their property in the business district of the Village of Flower Hill.

If successful here, the petitioners will have successfully converted each federal court into a "court of zoning appeals" from every municipality within its jurisdiction.

The petitioners have *twice* wended their way through the entire three-tiered New York state system to the New York Court of Appeals (*See Collard* v. *Inc. Village of Flower Hill,* 75 A.D.2d 631 (2d Dep't 1980), *aff'd,* 52 N.Y. 2d 594 (1981); and *Collard, et al.* v. *Runge, et al.,* No. 14312/82 (Sup Ct., Nassau Co. Nov. 9, 1982), *aff'd,* No. 1183E (2d Dep't Jan. 9, 1984), *app. denied,* No. 490 (Ct. App. June 29, 1984)).

Having twice failed in the state courts, the petitioners sought to re-litigate identical claims in the United States District Court for the Eastern District of New York. The District Court, per Hon. Jacob Mishler, dismissed their complaint in a decision affirmed by the United States Court of Appeals for the Second Circuit, part of which petitioners now ask this Court to review. *Collard, et al.* v. *Inc. Village of Flower Hill, et al.,* CV 82-2143 (E.D.N.Y.

Oct. 30, 1984) (A-11 - A-43);* *aff'd,* Docket No. 84-7996 (2d Cir. 1985) (A-1 - A-4).

The dismissal of the instant action has thus not deprived the petitioners of their "day in court". They already had innumerable days in court, and so many "bites of the apple" that they may fairly be accused of judicial gluttony.

1. The complaint.

Peitioners' complaint** contains two causes of action pursuant to 42 U.S.C. §1983:

The *first cause* of action alleges that petitioners' requested permission to enlarge an existing office building which they owned (as they were required to do pursuant to a covenant entered into by their predecessors in title as a condition for an earlier zoning change). The respondent Board of Trustees of the Incorporated Village of Flower Hill denied their application without comment, and thus, according to the petitioners, breached their constitutional rights.

The *second* cause of action alleges that the petitioners subsequently applied for a building permit in order to build a second principal building on their property. Accord-

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* References are to pages of the petitioners' Appendix on this application.

** Subsequent to the submission of respondents' renewed motion to dismiss, the petitioners, *inter alia,* submitted a proposed "Amended Complaint." As Judge Mishler held, however, the Amended Complaint added nothing of substance to the petitioners' causes, was based on the same operative facts and thus could not change the result. (A - 42)

ing to petitioners, the Village Attorney, the Village Building Inspector and the Village Zoning Board of Appeals conspired together to deny their application, (a) by arbitrarily, capriciously, and unconstitutionally interpreting applicable provisions of the Village Code so as to require a variance for the granting of such a permit, and (b) by then refusing to grant such a variance.*

2. Respondents' motion to dismiss.

Over two years ago, the respondents moved in the District Court to dismiss petitioners' complaint. The grounds for this motion were:

1. The first cause of action was barred in its entirety by principles of *res judicata* and collateral estoppel. The petitioners previously challenged the Board of Trustees in a state court action alleging, *inter alia*, the unconstitutionality of the action of the Board in turning down without comment the petitioners' request to enlarge their building. Their claim received a full and fair adjudication on the merits. The result of the petitioners' state court action was a dismissal affirmed in an opinion by the New York State Court of Appeals."**

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* The petitioners' parcel of land was made up of three "tax lots", with a building covering *two* of the lots. The third "tax lot"—tax lot No. 12—had no building actually covering any part of it. The challenged interpretation of the Village Code was one holding that under the Code the plaintiff's parcel of land, although comprised of three "tax lots", consisted of a single "lot" for zoning purposes. Due to a Code zoning provision permitting only one principal building per lot, a second building—in addition to the existing use—could thus not be built on the property without a variance.

** The District Court's eventual dismissal of this first cause of action was not challenged on appeal in the Court of Appeals, and is not raised in the instant petition.

2. The second cause of action should be dismissed on two grounds: (1) as an act of abstention by the District Court in light of the fact that the petitioners had challenged the same governmental action in a concurrent state court Article 78 proceeding; and (2) because it failed to state a congnizable constitutional cause of action in light of the fact, *inter alia,* that no facts had been pled from which it could be inferred that there had been any constitutionally cognizable "taking" of property.

3. The entire complaint should in any case be dismissed (a) as to the individual Board of Trustees due to their absolute legislative immunity; (b) as to the Building Inspector and Zoning Board of Appeals due to their absolute judicial immunity; (c) as to the Village Attorney due to his role solely as an advisor and counselor; and (d) as to all the individual respondents due to (i) their at least qualified "good faith" immunity and (ii) the petitioners' failure to plead facts which would satisfy the "objective bad faith" test for sufficiency of pleadings.

3. The District Court's stay of this action.

The District Court, rather than at that juncture abstaining from exercising jurisdiction and addressing the merits of respondents' motion to dismiss, instead stayed all proceedings in the federal action. The District Court's rationale was that at the time of submission of respondents' motion, the state-court Article 78 proceeding which the petitioners had brought to challenge the same actions which they challenge in their second cause of action here, had been decided adversely to them. However, the state court decision had not yet received full appellate review in the state courts. Considerations of, *inter alia,* judicial economy, therefore indicated a stay.

4. Justice Harwood's state court Article 78 decision.

In petitioners' Article 78 proceeding, the Supreme Court of the State of New York determined that the Zoning Board's supposedly arbitrary, capricious and discriminatory interpretation of the applicable Village Code in fact possessed a "rational basis" and was based upon "substantial evidence". In fact, the state court noted that it was the petitioners' requested interpretation of the Village Code which possessed an element of irrationality. (Decision per Harwood, J., A-44).

The Board's interpretation was not merely sustained as rationally based and supported by substantial evidence, but Justice Harwood affirmatively noted that petitioners' proposed interpretation of the Code was "ironic" and "would result in chaos and absurdity" (A-61 - A-62). Finally, Justice Harwood held that the Zoning Board's refusal to grant a variance to petitioners did not amount to a "confiscation" of petitioners' property.

5. The respondents' renewed motion.

After appellate review of Justice Harwood's decision in the state-court Article 78 proceeding had been completed, and the decision twice affirmed, the respondents renewed their motion to dismiss in the District Court.

In the renewed motion, the respondents pointed out that as a result of the ripening of the issues in the Article 78 proceeding, dismissal of the petitioners' second cause of action was now *mandated* by principles of *res judicata* and collateral estoppel, rather than merely *indicated* as a discretionary act of abstention.

6. The District Court's dismissal of the complaint and the Court of Appeals' affirmance.

Judge Mishler agreed, and dismissed both of petitioners' causes of action, based upon (a) priniciples of *res judicata* and collateral estoppel, and (b) as an alternative and independent ground, failure to allege a cognizable constitutional injury. Judge Mishler thus did not reach the question of dismissal on the grounds of the various immunities.

The Court of Appeals affirmed Judge Mishler's decision, adopting his discussion of the *res judicata* grounds for the decision, and otherwise affirming "for substantially the reasons set forth in the opinion below." (A-4).

The petitioners here challenge only the *res judicata* grounds for dismissing their second cause of action.

Summary of Argument

In *Point I* below, we demonstrate that petitioners' District Court action was properly dismissed because petitioners fully litigated their case in state court without reserving any issues for federal court adjudication.

In *Point II* below, we demonstrate that even if, *arguendo,* Judge Mishler was incorrect in dismissing the second cause of action on grounds of *res judicata* and collateral estoppel, he was nevertheless correct in determining that the petitioners failed to allege a cognizable constitutional injury, which constitutes an independently sufficient alternative ground for dismissal. The Court of Appeals was thus correct in affirming on this ground as well. Certiorari to review solely the Court's *res judicata* grounds for dismissal would thus be unavailing since

affirmance would nonetheless be required on this independent, unchallenged ground.

In *Point III* below, we demonstrate that even were this Court to reject the other grounds of Judge Mishler's decision and the Court of Appeals' affirmance, the dismissal of the complaint would in any case be upheld on additional independent and alternative grounds not addressed by either Judge Mishler or the Court of Appeals, although briefed and argued in both courts. That is, the individual Board of Trustees possess absolute legislative immunity; the Building Inspector and Zoning Board of Appeals possess absolute judicial immunity; the Village Attorney acted in a role solely as an advisor and counselor; and all the individual respondents possess, at least, qualified "good faith" immunity. As to these latter individual respondents, the petitioners have failed to plead facts which would satisfy the "objective bad faith" test for sufficiency of pleadings.

For all the above reasons, this Court should issue an order which will terminate once and for all the petitioners' seemingly endless parade of lawsuits and appeals, by denying petitioners' application for a writ of certiorari.

POINT I

Petitioner's District Court action was properly dismissed on the ground that prior state-court adjudication precludes relitigation in federal court.

In the District Court and in the Court of Appeals, the petitioners contended that their federal constitutional claim could not have been raised in their state-court Article 78 proceeding, and that *res judicata* was thus inapplicable. That argument is not raised here. Apparently petitioners concede that under the applicable federal and New York law of claim preclusion, they are barred from relitigating their federal claim in federal court since they could have done so in their state-court proceedings.

Having thus taken the position that they could have, but did not, litigate their federal claim in their state-court proceeding, the petitioners now argue that their purported federal claim was "preserved" for adjudication in the District Court because the state court was "aware" of the federal action (Petition for Cert., p. 16). In support of this erroneous contention, petitioners rely upon one sentence of the Court's decision in *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964), (Petition for Cert., p. 29).

In *England, supra,* this Court ruled that where a federal District Court has compelled a litigant to proceed in a state court, that litigant may elect to preserve his federal claim by informing the state court that he intends to return to the District Court for disposition of his federal claim. If, however, the litigant without reservation submits his entire case for decision by the state court, he will not be allowed to ignore an adverse state decision and relitigate the same issues all over again in the District

Court. This Court stated the rule in the following language:

> "[W]e see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court . . . . *We now explicitly hold that if a party freely and without reservation, submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then*—whether or not he seeks direct review of the state decision in this Court—*he has elected to forego his right to return to the District Court.*
>
> * * *
>
> "[*A*] *party may readily forestall any conclusion that he has elected not to return to the District Court. He may accomplish this by making on the state record, the 'reservation to the disposition of the entire case by the state courts'* that we referred to in Button. That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with Windsor, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. Such an *explicit reservation is not indispensible;* the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than Windsor required and fully litigated his federal claims in the state courts. *When the reservation has been made, however, his right to return will in all events be preserved.*"

(*England, supra,* at 419-421; emphasis added)

Decisions rendered since this Court's ruling in *England* have made clear that in order to preserve a federal claim, a litigant must advise the state court of his intention to return to federal court. Indeed, in 1984, both this Court and the Court of Appeals for the Second Circuit held that a litigant who wishes to preserve a §1983 claim for federal adjudication must specifically so advise the state court. Thus, in *Migra* v. *Warren City School District Board of Education,* —— U.S. ——, 79 L.Ed.2d 56, this Court stated as follows:

> "In the event that a Section 1983 plaintiff's federal and state law claims are sufficiently interwined that the Federal Court abstains from passing on the federal claims without first allowing the state court to address the state law issues, the plaintiff can preserve his right to federal forum for his federal claims *by informing the state court of his intention to return to federal court on his federal claims, following litigation of his state claim in state court.*"

(*Migra,* 79 L.Ed.2d at 64, fn. 7; emphasis added)

In *West* v. *Village of Morrisonville,* 728 F.2d 130 (2d Cir. 1984), the Court of Appeals for the Second Circuit reaffirmed the necessity of an explicit reservation by the claimant:

> "Appellant is also free, of course, to let the state court determine all of the issues in this case if she so chooses. The choice is hers: if she wishes to preserve her federal issues (should they remain) for federal court determination, she should simply reserve the relevant federal issues in the state court proceedings."

(*West, supra,* at 135 fn. 5)

And, in *Heimbach* v. *Chu,* 744 F.2d 11 (2d Cir. 1984), the court held that a litigant who has raised a constitutional issue in a state action may not relitigate the issue in federal court. In so holding, the Court of Appeals disapproved "piece-meal attacks such as are being attempted here."

In the present litigation, petitioners concede that they did not inform the state court that they were reserving their federal claim for adjudication by the District Court. Instead, they contend (1) that "all agree" that petitioners did not litigate their federal claim in state court (Petition for Cert., p. 29); (2) that the District Court stayed petitioners' federal action "with the expectation that upon conclusion of the state court proceedings . . . plaintiffs' federal action [would be] allowed to proceed" (Petition for Cert., p. 15); and (3) that petitioners' federal claim was *automatically* preserved because the state court was "aware" of the federal action and Judge Mishler's stay (Petition for Cert., p. 16).

Each statement is inaccurate, as Judge Mishler recognized and so ruled.

a. Petitioners litigated their federal claim in state court.

The federal claim and the state claim are the same claim. In the state-court proceedings, petitioners attacked the Zoning Board of Appeals' interpretation of the term "lot" as used in Village Code §86-1, the Board's finding that under §86-12 there is a limitation of one principal building per lot, and the Board's denial of the petitioners' request for a variance, as a "confiscation" of their property. In the federal claim, petitioners attacked the Zoning Board of Appeals' interpretation of the term "lot" as used in Village Code §86-1, the Board's finding that under

§86-12 there is a limitation of one principal building per lot, and the Board's denial of their request for a variance, as part of a conspiracy to deprive petitioners of their constitutional right not to be deprived of property without due process. This claim was fully litigated in the state Article 78 proceeding. After upholding the Zoning Board's interpretation of the Village Code,, Justice Harwood considered and rejected petitioners' claim that the Zoning Board's refusal to grant a variance amounted to a "confiscation" of petitioners' property. In so ruling, Justice Harwood stated:

> "Petitioners are thus called upon to demonstrate that the property cannot reasonably be used or that petitioners will suffer significant economic injury, unless a variance on the ground of 'practical difficulties' is granted. (*National Merritt, Inc.* v. *Weist,* 41 N.Y.2d 438, 393 N.Y.S.2d 379.) . . . *While arguing that denial of the variance is tantamount to confiscation of lot No. 12, petitioners do not argue that they are denied reasonable economic benefit from the parcel as a whole, and they have submitted no plan or application for building on lot No. 12 as a separate lot.*" (A-63 - A-64).*

Justice Harwood's decision was affirmed by both the Appellate Division and the New York State Court of Appeals. Thus, the state court adjudicated all of petitioners' claims, leaving nothing for federal court adjudi-

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* By arguing that their property had been "confiscated" because it could not "reasonably be used" without the variance, the petitioners did expressly present to the state court the question—and the state court did expressly decide—whether the denial of the variance constituted an unconstitutional exercise of the state's power. *National Merritt, Inc. v. Weist, supra,* 41 N.Y.2d at 445.

cation. Judge Mishler recognized that fact when he noted in his decision that the petitioners' federal claim is no more than a rephrasing of the state court claim "in terms of constitutional violations." (A-30).*

b. There was no "expectation" that the federal action would go forward upon the conclusion of the state court proceedings.

The stay of a federal action pending a determination of a related state court action has been judicially described and approved as a procedure which can avoid wasteful and duplicative litigation and which might well result in the ultimate dismissal of the federal action:

> "[A] federal court is not precluded in the exercise of its discretion, from staying proceedings in the action before it, pending a decision by the state court with a view to avoiding wasteful duplication of judicial resources and having the benefit of the state court's views. [citations omitted]
>
> Indeed, the state court's decision might, under some circumstances, provide a defendant in the federal action with the defense of collateral estoppel [citation omitted]."

(*Giulini* v. *Blessing,* 654 F.2d 189, 193-94 (2d Cir. 1981); See also, *Colorado River Water Cons. Dist.* v. *U.S.,* 424 U.S. 800 (1976)).

There is no support for petitioners' statement that Judge Mishler stayed the action with the "expectation"

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* Indeed, petitioners neither describe their federal claim nor distinguish it from their state claim anywhere in their Petition for Certiorari.

that it would later proceed on the merits in District Court. In issuing the stay, Judge Mishler did not indicate whether he did or did not expect the case to later proceed in District Court. Rather, he stated that one reason for granting the stay was to avoid "wasteful duplication of judicial resources," thus recognizing the possibility that the state court proceeding might prove to be dispositive of the petitioners' federal claim. Judge Mishler concluded his decision by stating that ". . . we do not *now* address defendants' motion to dismiss. We stay this action for all purposes, pending a final judgment in the state courts," thus indicating that, even after the state court proceedings were concluded, the respondents' motion to dismiss would be addressed before the case would be allowed to proceed any further. Thus, far from indicating that he expected that the petitioners' federal action would later go forward on its merits as petitioners claim, Judge Mishler clearly indicated that the federal claim might well be dismissed.

c. Petitioners failed to reserve their federal claim for District Court adjudication.

In spite of having been so forewarned, petitioners glibly proceeded to litigate their claims fully in the state-court proceeding without identifying or distinguishing the federal claim and without reserving any issues for federal court adjudication. Petitioners neither explicitly nor implicitly reserved any issue for the District Court. To the contrary, they fully and vigorously litigated their claim in the state court proceeding. Hence, their present contention that everyone simply was "aware" that certain issues were reserved for the District Court's determination because everyone knew that Judge Mishler stayed the federal action "with the expectation" that the action would

later proceed in the District Court is wholly illogical. Petitioners have not and cannot support their statement that the state court and the defendants were "aware" of petitioners' unspoken election to reserve certain issues. Nothing in the record indicates such an awareness. Quite to the contrary, the record clearly demonstrates that the state court heard and determined all of petitioners' claims. There was nothing left for the federal court to adjudicate.

In sum, petitioners' constitutional claim could have been and was presented to and determined by the state court in petitioners' Article 78 proceeding. The claim was not effectively preserved. The District Court was therefore precluded from later hearing petitioners' claim and properly dismissed it.

POINT II

Petitioners' failure to state a §1983 claim upon which relief can be granted was an independently sufficient ground for dismissal.

This petition requests review of the dismissal of a complaint instituted by petitioners who claim to be aggrieved by the failure of a municipality to grant them a zoning variance. Even if, *arguendo,* the dismissal on *res judicata* grounds is deemed improper, a question is presented as to whether the District Court's alternative ground for dismissal (that the petitioners failed to state a §1983 claim) is an independently sufficient ground for dismissal.

Judge Mishler, in the District Court, having discussed the bases for dismissal of the petitioners' complaint pursuant to principles of *res judicata* and collateral estoppel, went on to hold that:

> "Alternatively, plaintiff had failed to state a §1983 claim upon which relief can be granted and the claim should therefore be dismissed under Fed.R. Civ.P. 12(b)(6)." (A-35)

The Court of Appeals affirmed "for substantially the reasons set forth in the opinion below . . . ." The petitioners do *not* here request review of this alternative ground for dismissal, but the same would of necessity have to be reviewed by this Court if *certiorari* is granted.

In the District Court, Judge Mishler initially noted that the procedural due process claim advanced with respect to petitioners' first cause of action (and not pressed by petitioners here or in the Court of Appeals) was "frivolous" (A-35). Judge Mishler then went on to demonstrate that the petitioners did not allege "destruction" of the value of their property (A-39). They claimed a refusal to grant variances which would *increase* the value of their property (A-39), or which would, at worst, somewhat impair the property's value (A-39).

Judge Mishler ruled that "[t]he constitution does not protect a property owner's right to make more money than the zoning regulations permit, or a right to a fair market value of property at its highest and best use [citing *Penn Central Transportation Co.* v. *City of N.Y.*, 438 U.S. 104 (1978) and *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962)" (A-40), and that the petitioners thus failed to state a cause of action. He concluded as follows:

> "Recently, the Second Circuit Court of Appeals in *Park Avenue Tower Associates* v. *City of New York*, No. 84-7128 (Oct. 12, 1984), in affirming a grant of summary judgment dismissing the complaint, stated that a 'legion of cases . . . . have upheld regulations which merely diminished the value of commercial property.' Slip op. 6643.

> The plaintiffs in the instant case do not complain of an ordinance that reduces the value of their property, but complain that the Village of Flower Hill refuses to grant their request under existing regulations that would have the effect, if granted, of increasing the value of their property. I find, however, regardless of this difference, that plaintiffs' substantive due process claim is controlled by the foregoing decisions and should be dismissed under Fed.R.Civ.P. 12(b)(6)." (A-39 - A42, footnote omitted.)

The Court of Appeals affirmed stating:

> "We have carefully considered the Collards' numerous arguments on appeal, and find them to be without merit. Accordingly, for substantially the reasons set forth in the opinion below, the judgment of the district court is affirmed." (A-4).

Thus, even were the decisions of the Court of Appeals and the District Court reviewed and found to be erroneous on *res judicata* grounds, they should nonetheless be affirmed on the alternative ground that the petitioners failed to state a cause of action.

Justice Harwood, in his decision on the petitioners' state-court Article 78 proceeding (a decision enforceable via collateral estoppel even if, *arguendo,* the §1983 action were not precluded in its entirety by *res judicata*), noted that the petitioners had failed to demonstrate either any "significantly economic injury" or that the property "cannot reasonably be used" (A-63). Justice Harwood found the interpretation of the Village Code by the Village Zoning Board to be "rationally based" and "supported by substantial evidence" (A-65). The failure to grant a variance, then, simply left the property in its existing state. Peti-

tioners have no constitutional right, at least vis-a-vis the government, to achieve the most beneficial use of their property.

Judge Mishler thus correctly determined that the petitioners failed to state a cause of action under §1983, and correctly dismissed their complaint.

POINT III

The complaint was properly dismissed for the additional reason that each of the respondents has absolute or qualified immunity from such claims.

Having dismissed petitioners' complaint on the grounds of (a) *res judicata* and collateral estoppel and (b) failure to allege a cognizable constitutional injury, Judge Mishler found it unnecessary to reach the issue of the various immunities possessed by each of the respondents. The Court of Appeals also found it unnecessary to reach this issue. However, we here demonstrate that these immunities present yet another independently sufficient basis for dismissing petitioners' complaint.

Pursuant to the well-settled rules that federal, state and local legislators, and persons acting in a legislative, judicial or quasi-judicial capacity, have absolute (unqualified) immunity from claims under §1983, the complaint must be dismissed against the members of the Board of Trustees and the Zoning Board of Appeals.*

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* Although not entitled to absolute immunity, the complaint against the Village Attorney should nevertheless be dismissed. The role of the Village Attorney is merely that of an advisor and legal counselor to the various governmental bodies and officials of the Village.

Both this Court and the Second Circuit Court of Appeals have held that legislators are entitled to absolute immunity, *Tenny* v. *Brandhove,* 341 U.S. 367, 95 L.Ed. 1019 (1951); *Star Distributors Ltd.* v. *Marino,* 613 F.2d 4, 9 (2d Cir. 1980). There is likewise no question but that absolute immunity is to be accorded to local legislators, local public officials acting in that capacity, and to members of a village board of trustees, *Lake County Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U.S. 391, 59 L. Ed. 2d 401 (1979); *Searingtown Corporation* v. *Incorporated Village of North Hills,* No. CV-80-2670, slip opinion (E.D.N.Y. Nov. 6, 1981).

Zoning is a legislative power which the state has elected to delegate to the cities, villages and towns. 12 N.Y. Jur., Buildings §§79, 82, 382, 383. *See Collard* v. *Incorporated Village of Flower Hill, supra,* 52 N.Y. 2d at 601; *McDonough* v. *Apton,* 48 A.D. 2d 195, 198 (4th Dep't 1975); *Robert E. Kurzius, Inc.* v. *Incorporated Village of Upper Brookville,* 51 N.Y. 2d 338, 344 (1980), *cert. denied,* 450 U.S. 1042 (1981).

The Board of Trustees, in the action before this Court, is a legislative body, and the members thereof acted in a legislative capacity with respect to their alleged acts complained of by petitioners.* *See, Goldberg* v. *Village of Spring Valley,* 538 F. Supp. 646 (S.D.N.Y. 1982).

Since the members of the Board of Trustees acted in a legislative capacity in connection with the actions about which the petitioners complain, they have absolute immunity from claims under §1983 for damages as well as declaratory and injunctive relief. The complaint thereofre fails to state a claim upon which relief can be granted against these respondents and must be dismissed.

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* The mayor and trustees are elected officers. New York Village Law § 3 - 301 (3).

The members of the Zoning Board of Appeals ("ZBA") are absolutely immune pursuant to the equally well-settled rule that persons acting in a judicial or quasi-judicial capacity have absolute immunity from claims for damages under §1983, *Pierson* v. *Ray,* 386 U.S. 547, 18 L.Ed.2d 288 (1967); *Stump* v. *Sparkman,* 435 U.S. 349, 55 L.Ed.2d 331 (1978); *Heimbach* v. *Village of Lyons,* 597 F.2d 344 (2d Cir. 1979).

Recent decisions have broadened the ambit of those persons found to act in a judicial or quasi-judicial capacity. This trend is based on a recognized need to permit decisions of a judicial or quasi-judicial nature to be made on a basis of independence, free from fear of retribution through legal action. Absolute immunity has been accorded to parole board members, *Sellars* v. *Procumir,* 641 F.2d 1295 (9th Cir. 1981); to prosecuting attorneys, *Imbler* v. *Pachtman,* 424 U.S. 409, 47 L.Ed.2d 128 (1976); to court clerks, *Shipp* v. *Todd,* 568 F.2d 133 (9th Cir. 1978); to county auditors and county treasurers, *Harnow* v. *Supreme Court of Arizona,* 329 F.2d 154 (9th Cir. 1964); and to federal hearing examiners, administrative law judges, and certain agency officials, *Butz* v. *Economou,* 438 U.S. 478, 57 L.Ed.2d 895 (1978).

The role and functions of the ZBA are established by the New York Village Law §7-712 and Article V of Chapter 86 of the Village Code. Under the Village Law, the ZBA ". . . shall hear and decide appeals" from determinations made by administrative officials charged with the enforcement of ordinances and local laws. The chairman of the ZBA may reverse or affirm, wholly or partly, or may modify the determination appealed from. The ZBA's decisions must be filed with the Village Clerk and are subject to review by the New York Supreme Court by way of an application under Article 78 of the New York Civil Practice Law and Rules ("CPLR").

The role of the ZBA, and the members thereof in rendering the decisions made in connection with the matters complained of by the petitioners, were certainly judicial or quasi-judicial in nature. Therefore, under established precedent, the four members of the ZBA who are respondents here are absolutely immune from the damages demanded in this action.*

Additionally, the individual members of the Board of Trustees, the individual members of the ZBA, and Messrs. Howe and Farrell are entitled to a qualified, good faith immunity.

Qualified immunity has been accorded to public officials at all levels of government, including members of school boards, *Wood* v. *Strickland,* 420 U.S. 308, 43 L.Ed.2d 214 (1975); prison officials, *Procanier* v. *Navarette,* 434 U.S. 555, 55 L.Ed.2d 24 (1978); state hospital superintendents, *O'Connor* v. *Donaldson,* 422 U.S. 563, 45 L.Ed.2d 396 (1978); the mayor, deputy mayor, building inspector and other officials of a village, *Laverne* v. *Corning,* 522 F.2d 1144 (2d Cir. 1975); a deputy sheriff, *Tucker* v. *Maher,* 497 F.2d 1309, 1313 (2d Cir. 1974); and prosecutors, *Imbler* v. *Pachtman,* 424 U.S. 409, 47 L.Ed.2d 128 (1976).

In *Harlow* v. *Fitzgerald,* 457 U.S. 800, 73 L.Ed. 2d 396 (1982), this Court eliminated the subjective part of the test for good faith:

> "*The subjective element of good faith defense frequently has proved incompatible with our admonition in Butz that insubstantial claims should not*

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* With regard to Respondent Howe, the Building Inspector, it has been held that the refusal by a building inspector to issue a building permit was a discretionary act, *quasi-judicial* in character, and, therefore, he was shielded from liability. *Rottkemp v. Young,* 21 A.D.2d 373 (2nd Dep't 1964), *aff'd* 15 N.Y.2d 831 (1965).

> *proceed to trial.* Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.
>
> * * *
>
> [W]e concluded today that *bare allegations of malice* should not suffice to subject government officials either to the costs of trial or to the burdens of broad reaching discovery. *We therefore hold that government officials performing (discretionary) functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."*

Id. at 815-818, 73 L.Ed.2d at 409-410 (emphasis added).*

Because the complaint in this action fails to allege a lack of good faith in any respect, much less malice, and fails to allege that the individual respondents acted beyond the scope of their duties, it must be dismissed as to the members of the Board of Trustees, members of the ZBA, Village Attorney and Building Inspector, all of whom were named as defendants in their official capacities.

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* Although *Harlow* involved federal officials, the good faith test *of Harlow* is the same for state and local officials under § 1983. *Harlow v.Fitzgerald,* 457 U.S. 800, 73 L.Ed2d 396 (1982).

CONCLUSION

The petition for writ of certiorari should be denied in all respects.

Dated: Mineola, New York
July 22, 1985

Respectfully submitted,

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